

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WHITE RIVER DEVELOPMENT GROUP, LCC,

Plaintiff-Appellee,

v

SOUHEGAN RIVER ASSOCIATES,

Defendant/Cross-Plaintiff-Appellee,

and

RANDALL DECHER and CONNIE DECHER,

Third-Party Defendants-Appellants.

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UNPUBLISHED

May 29, 2003

No. 234972

Manistee Circuit Court

LC No. 98-008907-CH

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Third-Party Defendants Randall and Connie Decher appeal as of right from a judgment quieting title in Defendant/Cross-plaintiff Souhegan River Associates. We reverse and remand.

This dispute arose after defendants Thomas and Clara Lane<sup>1</sup> refused to honor an agreement they had entered to sell the Dechers two parcels of vacant land. Souhegan, which had acquired all of the Lanes' interest in the parcels, argued that the agreement contained a condition precedent – that the Lanes be able to produce marketable title – and that the condition had not been fulfilled; thereby, relieving the Lanes of their obligation to perform. Following a bench trial, the trial court agreed and this appeal followed.

The Dechers contend on appeal that the trial court erred when it found that there was a condition precedent in the agreement. We review a trial court's decision in an action to quiet title de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). A trial court's findings of fact are reviewed for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A finding is clearly erroneous where, after reviewing the

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<sup>1</sup> The Lanes' are not parties to this appeal having transferred any interest in the subject property to Souhegan River Associates.

entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

In *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999), this Court stated,

A “condition precedent” is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor. Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled by the language in the contract. [citations omitted.]

Also, “[w]hether a provision in a contract is a condition the non-fulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract.” *McDonald v Perry*, 342 Mich 578, 586; 70 NW2d 721 (1955), quoting *Knox v Knox*, 337 Mich 109, 112-113; 59 NW2d 108 (1953).

Paragraph 1B of the purchase offer contract stated that sale of the land was to be consummated by the Lanes delivering a “warranty deed conveying a marketable title” and the Dechers obtaining a mortgage to pay the purchase price. Also, paragraph 2 provided that the Lanes were to provide title insurance or, alternatively, an abstract of title as proof of marketable title. Michigan courts have held that a provision like that in paragraph 2, requiring the seller to obtain proof of marketable title, constitutes a condition precedent to the purchaser being obligated to tender the purchase price. *Sobczak v Kotwicki*, 347 Mich 242, 249-250; 79 NW2d 471 (1956); *Ludwig v Hall*, 234 Mich 478, 480-481; 208 NW 436 (1926); *Efrusy v Mack*, 219 Mich 85, 88; 188 NW 374 (1922). Therefore, if the Lanes could not provide proof of marketable title, then the Dechers could rescind the contract and the Lanes would not have had a right to enforce the contract. *Knox, supra* at 112. Paragraph 5 was only operable once the title insurance or abstract of title was given to the Dechers for review. In this case, it is undisputed that the Lanes could not obtain title insurance. Therefore, paragraph 5 is inapplicable.

According to case law, because of the Lanes failure to provide either title insurance or an abstract, the Dechers had the right to rescind the contract. However, the Dechers are not seeking to rescind the contract, but rather are seeking specific performance of it. The question becomes whether the Dechers are entitled to specific performance where the Lanes could not or did not provide marketable title? Our Supreme Court provided the answer to this conundrum in *Kruger v Agnor*, 321 Mich 131, 136-137; 32 NW2d 365 (1948), holding that if a seller cannot convey marketable title as agreed, in this case a whole fee interest, the purchaser has a right to enforce the contract as to the seller’s partial interest with a proportional abatement of the contract price so long as the purchaser was unaware of the seller’s inability to convey the whole fee.

Thus, the first issue is whether the Dechers’ knew the Lanes would not be able to convey marketable title by the time the sale was to be finalized. *Id.*, see *Silfver v Daenzer*, 167 Mich 362, 369; 133 NW 16 (1911) (vendor need not have perfect title at the time he enters into a contract, but only that he be able to deliver it at the proper time). If the Dechers’ were unaware, then paragraph 4 of the contract provides the purchaser’s remedy in the event of the seller’s

breach. “[T]he purchaser may, at his option, elect to enforce the terms hereof or demand, and be entitled to an immediate refund of his entire deposit in full termination of this agreement.” Thus, the Dechers’ would be entitled to conveyance of whatever interest the Lanes’ had in parcels B and C with a proportional abatement in the purchase price. These issues were not addressed by the trial court.

Instead, the trial court erroneously concluded that the Lanes’ obligation to provide marketable title was a condition precedent. Failure to convey marketable title is considered a breach of covenant, *Id.* at 137, not a condition precedent. Accordingly, we remand this case in order for the trial court to consider the evidence in light of the above outlined legal principles and the questions derived therefrom.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Richard Allen Griffin

/s/ Peter D. O’Connell